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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-0560-18

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

DONALD COUTHREN II,
Appellant

VS.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRTEENTH COURT OF APPEALS
CORPUS CHRISTI, TEXAS
COURT OF APPEALS NO. 13-16-00543-CR
AFFIRMING THE CONVICTION IN CAUSE NO. 12-04815-CRF-361

STATE'S BRIEF

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TRIAL COURT:	Hon. Steve Smith Presiding Judge, 361st District Court Brazos County, Texas

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No. PD-0560-18

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

DONALD COUTHREN II,
Appellant

VS.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRTEENTH COURT OF APPEALS
CORPUS CHRISTI, TEXAS
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AFFIRMING THE CONVICTION IN CAUSE NO. 12-04815-CRF-361

STATE'S BRIEF

TO THE HONORABLE COURT CRIMINAL OF APPEALS:

COMES NOW, the State of Texas, by and through its District Attorney, and files this brief in response to the point of error alleged by Appellant, and would respectfully show the Court the following:

STATEMENT OF CASE

Appellant, Donald Couthren II, was charged by indictment with Driving While Intoxicated 3rd or More and Aggravated Assault with a Deadly Weapon. (CR 5). Appellant went to trial only on the charge of Driving While Intoxicated 3rd or

More with a Deadly Weapon. (2 RR 15-16). On May 24, 2016, Appellant pled not guilty to the offense and true to the jurisdictional enhancements. (2 RR 16). The jury found Appellant guilty of the offense on May 24, 2016. (2 RR 204). On May 25, 2016, the jury assessed punishment at six years in IDTDCJ. (2 RR 120-121). The jury also answered "true" to the special issue of Appellant using or exhibiting a deadly weapon during commission of the offense. (2 RR 204). On June 23, 2016, Appellant filed a motion for new trial with the trial court. (Supp. CR 6). On August 2, 2016, the trial court held a hearing on Appellant's motion for new trial. (4 RR 1). The trial court denied Appellant's motion for new trial. (4 RR 33). On September 22, 2016, Appellant filed a Notice of Appeal. (CR 38). On October 7, 2016, this appeal was transferred from the Tenth Court of Appeals to the Thirteenth Court of Appeals.

On May 3, 2018, the Thirteenth Court of Appeals affirmed Appellant's conviction in an opinion which held that the evidence was sufficient to support the deadly weapon finding by the jury. *Couthren v. State*, No. 13-16-00543-CR, 2018 WL 2057244 (Tex. App.—Corpus Christi May 3, 2018, pet. granted) (not designated for publication). On June 3, 2018 Appellant filed his Petition for Discretionary Review. Petition for Discretionary Review was granted on September 12, 2018 by this Court on the issue of whether "[t]he holding of the court of appeals is in conflict with opinions of this Court holding there must be evidence of dangerous or reckless

operation of a vehicle to support a finding it was used as a deadly weapon and the occurrence of a collision or consumption of alcohol do not establish those elements." (Appellant's Petition for Discretionary Review, pg. 2).

STATEMENT OF FACTS

State's Evidence During Guilt-Innocence

Officer Andrew Doran of the Bryan Police Department (BPD) testified that he had been a patrol officer with the department for about five and half years. (2 RR 30). On June 16, 2012, Doran was working the 3:00 p.m. to 3:00 a.m. shift, and he was dispatched to a disturbance call at about 2:30 a.m. (2 RR 31-33). The disturbance was located at the 500 block of North Washington. (2 RR 33). According to Doran, there was a green Lexus parked in front of 504 North Washington. (2 RR 33). There was also a white Chevrolet SUV parked in the driveway of 504 North Washington. (2 RR 47). A man was standing near the Lexus along with other individuals who were in the driveway. (2 RR 33). Officer Doran noticed that the Lexus had been involved in an accident. (2 RR 37).

Doran testified that when he arrived on scene, he first made contact with Appellant. (2 RR 34). Appellant was standing near the back bumper of the Lexus. (2 RR 34). There was some blood on Appellant's face, but Appellant was not bleeding profusely. (2 RR 35). Appellant stated that four men who were in the yard of 504 North Washington jumped him, and he was involved in a physical altercation. (2 RR

35). Doran stated when he was speaking with Appellant, he smelled an odor of alcohol on Appellant's breath. (2 RR 35). Another officer arrived to the disturbance call, Officer Crystal O'Rear, and they divided up duties while on scene. (2 RR 36).

While on scene, Doran performed an accident investigation and noted that there was a man sitting in the Lexus vehicle who had obvious injuries. (2 RR 37). Doran stated that Appellant never told the officer there was an individual in the car who was injured. (2 RR 37). The individual in the passenger seat was clearly visible, had blood on his arms and face, and was incoherent. (2 RR 38). Viewing the vehicle, Doran noted that the windshield was shattered, and it was a spider web of broken glass. (2 RR 38). There was also a large indentation in the windshield. (2 RR 38). It appeared as though the pedestrian's head struck the car at the location of the indentation. (2 RR 50). Additionally, there was blood in the spider webbing of the glass and dried blood on the hood of the vehicle. (2 RR 38). The hood of the vehicle had minor damage. (2 RR 38). Doran testified:

> it looked like to me that something had been hit, thrown up on the hood, and then like come to rest or hit the windshield. Based on the blood on the guy's face and the circular indentation in the glass, it looked to me like he got hit, thrown up over the hood, and his head hit the windshield.

(2 RR 38-39).

Doran stated that it appeared like the individual in the passenger seat had hit the vehicle pretty hard. (2 RR 39). The individual in the passenger seat was taken to the hospital. (2 RR 39). Doran also stated that it appeared that the small amount of blood

on Appellant's face came from the glass on the Lexus shattering during the accident. (2 RR 51). Officer Doran noticed that all the blood was pretty much on the passenger side of the vehicle. (2 RR 52).

When Officer Doran spoke to Appellant, he stated he was driving north on the service road of Highway 6, just south of Tabor road. (2 RR 41). Appellant stated that around this area he had struck a pedestrian that had stepped out in front of his vehicle. (2 RR 42). Appellant told Doran that he was driving the car when this happened. (2 RR 42). Officer Doran further testified that Appellant had no definitive answer when he asked Appellant why he did not stay on scene and call 911 when he hit the pedestrian. (2 RR 43). Appellant told him his vehicle was damaged and he was going to 504 North Washington to swap vehicles with his girlfriend. (2 RR 43). Officer Doran stated, through his investigation, he determined that Appellant lived at 3720 Elaine Drive. (2 RR 43). Officer Doran testified that if Appellant was traveling north on Highway 6, he would be heading towards 3720 Elaine Drive, Appellant's home. (3 RR 43, 47).

Doran testified that O'Rear was the lead officer in the investigation and that it was her responsibility to decide if an offense had occurred. (2 RR 54). However, based on helping with O'Rear with the investigation, he determined that the offense of Driving While Intoxicated (DWI) had occurred. (2 RR 54). The observations that led him to believe this offense had occurred was Appellant's physical appearance

including the odor of alcohol on his breath, and other factors like the time of night, and Appellant's impaired judgment in not calling 911 or taking the passenger to the hospital. (2 RR 55-57). Furthermore, Doran stated that from his experience working all three shifts with BPD, he was involved in more DWI investigations during the nighttime hours, and he saw more DWI investigations during the weekends. (2 RR 55-56). It was pretty clear to Doran when he arrived on scene that the Appellant was intoxicated, and he would have made the same decision to arrest if he was the primary officer. (2 RR 57).

On cross-examination, Doran testified that he did not go to the scene of where the accident actually occurred. (2 RR 58). When Doran spoke to the passenger in the vehicle, he was incoherent and did not provide a reason why he was in the vehicle. (2 RR 60). It was possible that Appellant had left a bar when he started driving on June 16, 2012, since bars in Texas have last call at 2:00 a.m. (2 RR 63).

Crystal O'Rear testified that she was a former BPD officer. (2 RR 89). At the time of trial, O'Rear had just resigned from her position after nine years as a police officer with the department since she had a two year old daughter. (2 RR 89-90). On June 16, 2012, O'Rear responded to a disturbance call in the 500 block of North Washington Street. (2 RR 90). O'Rear testified that when she arrived on scene she observed that "[t]here was a vehicle that was parked in the roadway that was running and there was a person inside the vehicle with a bloody face. There was

damage to the windshield and people arguing." (2 RR 91). O'Rear stated that she did not completely know what was going on when she arrived on scene, but the first thing that she did when she arrived was request medics for the injured guy in the passenger seat. (2 RR 91). The injured passenger was reclined in the seat and bloody. (2 RR 102).

When O'Rear first made contact with Appellant, he was in the yard of the residence. (2 RR 93). O'Rear stated that she first noticed that Appellant had a strong odor of alcohol coming from his person. (2 RR 93). Appellant's speech was also slurred, his eyes were glassy and bloodshot, and he was swaying as he moved. (2 RR 95).

O'Rear had a conversation with Appellant, and Appellant admitted to driving. (2 RR 96). Appellant told O'Rear that he hit the passenger in his car. (2 RR 96). Appellant stated he hit the passenger near Tabor and North Earl Rudder Freeway. (2 RR 96-97). This was miles from where Appellant and O'Rear were currently located. (2 RR 97). O'Rear also stated that this would technically be considered a hit and run because Appellant left the scene of an accident. (2 RR 97). O'Rear stated that Appellant told her that he left the scene of the accident in order to go switch out cars at his girlfriend's house. (2 RR 97). Appellant stated that he wanted to switch vehicles to one that did not have windshield damage so that he could drive the passenger to the hospital. (2 RR 97). O'Rear testified that although the passenger

side windshield was completely shattered, the driver's side windshield was pretty clear. (2 RR 97). O'Rear also testified that it was clear that Appellant had been able to drive from the accident site to 504 North Washington. (2 RR 97-98). According to O'Rear, it did not make sense to her why Appellant loaded the pedestrian into his vehicle and drove him to 504 North Washington in downtown Bryan since Appellant had a cell phone on him and could have called paramedics to the scene of the accident. (2 RR 98). O'Rear also testified that by Appellant driving from the accident scene to 504 North Washington, Appellant was continuing to place the passenger, Frank Elbrich, in danger of being hurt or dying. (2 RR 115). O'Rear stated that poor decision making skills are part of the totality of the circumstances in considering whether an individual is intoxicated. (2 RR 98).

Regarding intoxication, O'Rear testified that it was common to run into extremely intoxicated individuals who can still stand, walk around, and have a conversation. (2 RR 99). O'Rear believed, based on her training and experience, that Appellant was intoxicated that night. (2 RR 103). O'Rear stated that she believed Appellant was intoxicated based on the totality of circumstances: bloodshot eyes, the swaying, the strong odor of alcohol, the slurred speech, and the poor decision making in deciding to drive the passenger to the house instead of calling 911 or driving him to a hospital. (2 RR 104-105).

When O'Rear asked Appellant about the amount he had to drink, he initially told her he did not have anything to drink. (2 RR 105). When O'Rear questioned that statement, Appellant quickly admitted he had two cans of Four Loko. (2 RR 105-106). O'Rear testified that the alcohol content of two Four Loko cans (at 12% alcohol by volume per 23.5 ounce can) would be about the equivalent of a 12-pack of regular beer. (2 RR 106-107). O'Rear stated that lying about drinking is another factor that is significant when investigating intoxication. (2 RR 107). O'Rear testified that Appellant immediately refused to perform field sobriety tests when asked. (2 RR 109). After O'Rear arrested Appellant, she read him warnings: that if he refused to submit to the taking of a blood specimen that refusal can be used as evidence in his case and his driver's license could be suspended. (2 RR 110-111). Appellant refused to submit to the taking of a blood specimen. (5 RR 19).

Jennie Rios stated she did not want to testify, and she was only here in court because of a court ordered subpoena. (2 RR 69). At the time of the incident, she was in a boyfriend-girlfriend relationship with Appellant. (2 RR 69). Rios and Appellant had been in a relationship for about six to eight months. (2 RR 70). They were living together at Appellant's house. (2 RR 69-70). Rios stated that she and Appellant had a child together. (2 RR 70). At the time of trial, Rios was on probation for burglary, she had a history of drug use, and had been a trouble a number of times for drugs and crimes related to drugs. (2 RR 70).

On June 16, 2012, she had been hanging out with her cousin, Melinda Ybarra, at the Tropicana nightclub. (2 RR 71). Rios stated that shortly after 2:00 a.m., she drove her cousin home. (2 RR 72). It was at Ybarra's home, at the address of 504 North Washington, Rios came into contact with Appellant that night. (2 RR 72). Rios first noticed Appellant when he was pulling up. (2 RR 72). When Appellant came up to Rios he was really angry and upset. (2 RR 73). Rios could tell Appellant was intoxicated because she was familiar from other occasions with how Appellant acted when he was intoxicated. (2 RR 73-74). Rios testified that Appellant's current drink of choice was Four Loko. (2 RR 74). Rios also stated that Four Loko came in cans twice the size of regular beer and had about three times the amount of alcohol. (2 RR 74).

Rios testified that Appellant "came up to me, grabbed me by my arm, and he was telling me that he wanted me to go with him to the police station because he had ran over somebody and wanted me to say I was driving the vehicle." (2 RR 76). Rios told Appellant was that she was not going to do what he was asking. (2 RR 77). The men that were at her cousin's house were upset by Appellant grabbing Rios by her arm, and the men fought Appellant. (2 RR 77-78). Rios did not call the police and when the police arrived Rios stayed inside the house. (2 RR 80). On cross-examination, Rios stated that the Buick she was driving that night was given to her by the Appellant and was in Appellant's name. (2 RR 86).

Frank Elbrich recalled some of what happened during the night and early morning of June 16, 2012. (2 RR 135). Elbrich had been to Mel's, a roadhouse located on Tabor Road. (2 RR 136). Elbrich admitted that he had been drinking that night. (2 RR 136). Elbrich called a friend to pick him up from Mel's, but that friend never came. (2 RR 136). Elbrich made a conscious decision not to drive that night. (2 RR 137-138). Elbrich admitted that he had already been convicted twice for DWI. (2 RR 138).

Elbrich then started walking to Four Corners Grocery. (2 RR 136). Four Corners Grocery was located about a quarter mile past Tabor Road and Highway 6. (2 RR 137). Elbrich was walking on the right side of Tabor Road on his way to Four Corners Grocery. (2 RR 138). The last thing Elbrich remembered about the night of June 16, 2012 is the Highway 6 overpass at Tabor Road. (2 RR 137, 139). The next day Elbrich woke up in St. Joesph's Hospital. (2 RR 139). Elbrich sustained six broken ribs, a broken leg, a possible concussion, and a possible neck injury. (2 RR 140). Elbrich was released from the hospital that day, but was only able to go back to work about two and half months later due to the injuries he sustained. (2 RR 140). Elbrich testified that he never found out who hit him. (2 RR 140). On cross-examination, Elbrich testified that he did not remember how much he drank that night, but that he knew he was not going to be driving. (2 RR 141).

Derek Faldik of Brazos County 911 testified that he had been working for Brazos County 911 for about nine and a half years. (2 RR 142). Faldik was on duty on June 16, 2012. (2 RR 142). Faldik stated that all phone calls that come in are recorded. (2 RR 143). In State's Exhibit 18, the house manager from Phoebe's home called in and reported that there was an argument going on nearby between a male and female. (5 RR 21, 0:04 – 0:15).

Appellant's Evidence During Guilt-Innocence

Madison Rodriguez testified that Appellant was her fiancé. (2 RR 148). Rodriguez had been engaged to Appellant since December 2015, and they had been together for four years. (2 RR 148). Rodriguez testified she was present during the custody exchanges for Rios and Appellant's daughter. (2 RR 148). Rodriguez further testified that in her opinion Rios is not a believable person and that Rios has lied to her. (2 RR 148).

Donald Couthren, II, the Appellant, testified that in 2012 he lived at 3720 Elaine Drive in Bryan, Texas. (2 RR 152). Appellant testified that on June 16, 2012, he was at his house all day long. (2 RR 153). Appellant had two vehicles, a '97 Buick LeSabre and a '91 Lexus LS 400. (2 RR 153). Appellant stated that he had consumed two Four Loko cans between 2:00 p.m. and 5:00 p.m. that day. (2 RR 153). Appellant stated that Jennie Rios' grandmother, mother, and two children lived with him in his three-bedroom house; but Rios did not. (2 RR 154-155). Appellant elaborated that

Rios lived either at Melinda Ybarra's house or with several other friends. (2 RR 155). According to Appellant, he and Rios were not in a relationship, he was just trying to help her family. (2 RR 155).

Appellant stated that around 2:00 a.m. that night, Rios' youngest daughter came and told him to go get Rios from Ybarra's home. (2 RR 156). Appellant stated that Rios' daughter was crying and upset and told him that Rios was "getting messed up again . . . ." (2 RR 156). Appellant stated that at that point he got up and went to go save Rios. (2 RR 156). Appellant stated that he headed south on Highway 6 towards downtown Bryan. (2 RR 157). Appellant stated that he never actually got on Highway 6, he was just on the frontage road. (2 RR 158). Appellant testified that Elbrich stepped out in front of his vehicle. (2 RR 158). Appellant stated that he never saw Elbrich before he stepped out in front of his vehicle. (2 RR 158). According to Appellant, when Elbrich stepped out in front of his car, he swerved to avoid him and that's when he hit the passenger side of the windshield. (2 RR 158).

Appellant stated that after he struck Elbrich, he stopped and got out his car. (2 RR 159). Appellant stated that Elbirch was bloody and unconscious. (2 RR 159, 174). Appellant stated that next he helped Elbrich get into his car in order to get him to the hospital. (2 RR 160). It took a good deal of effort to get Elbrich into his vehicle. (2 RR 174). Appellant stated that after picking up Elbrich, he went to go pick up his other car --'97 Buick LeSabre that Jennie Rios had borrowed earlier that day. (2 RR

160). Appellant stated when he arrived at Ybarra's house, he told Rios "I hit a person and I need your help -- or, I need the keys to my car." (2 RR 162). Appellant stated he never told Rios that he needed her to take responsibility for hitting Elbrich. (2 RR 162). Appellant testified that Rios refused to give him the keys to the Buick. (2 RR 163). Appellant testified that at this point five guys who were at the house jumped him and beat him to the ground. (2 RR 163-164). Appellant explained that when the five guys jumped him they punched and kicked him, kneed him in his head, and kicked him in his back. (2 RR 164). Appellant stated that he told police about being jumped when they arrived on scene. (2 RR 164).

On cross-examination by the State, Appellant testified that he was "stone cold sober" that night. (2 RR 166). Appellant admitted that the argument heard by the person who called 911 that night was between him and Rios. (2 RR 166). Appellant testified that he never before met the five guys who jumped him. (2 RR 169). Appellant stated that the five guys jumped him because he wanted his car. (2 RR 169). Appellant admitted that he never told police that he was on his way to save Rios that night. (2 RR 169-170). Appellant agreed that he simply told the officers who arrived that night that he was there to get his car. (2 RR 170). Appellant also admitted that he told Officer Doran and Officer O'Rear that he was heading northbound, not southbound, on Highway 6 service road when he hit Elbrich. (2 RR 171). Appellant testified that even though he had a cellphone, he did not call 911 or

any police department. (2 RR 172). Appellant stated that he did not call 911 even though Elbrich was laying on the ground, unconscious and bleeding after Appellant hit him. (2 RR 172). Appellant also admitted that he first told the police about being jumped, not about Elbrich lying injured in his car. (2 RR 174). Appellant also admitted he did not call the police about the five men who jumped him. (2 RR 177-178). Appellant testified that his insurance company paid Elbrich's medical bills. (2 RR 179).

SUMMARY OF THE ARGUMENT

Appellant argues that the evidence was insufficient for finding that Appellant used or exhibited a deadly weapon while he was driving while intoxicated. According to Appellant, the only evidence demonstrating dangerous or reckless operation was the occurrence of a collision and the consumption of alcohol by Appellant. Appellant states that these two factors are not enough to demonstrate that the manner of operation was reckless or dangerous.

The State responds that Appellant used his vehicle in a manner capable of causing serious bodily injury or death. Specifically, Appellant operated his vehicle in a reckless and dangerous manner during the commission of the DWI offense both (1) before and at the time he hit Elbrich with his vehicle and (2) after hitting Elbrich with his vehicle. Appellant operated his vehicle in a reckless and dangerous manner by failing to control his vehicle at a reasonable rate of speed and striking Elbrich so

hard that the windshield was shattered. Appellant also operated his vehicle in a reckless and dangerous manner after striking Elbrich by loading an unconscious Elbrich into his vehicle and preventing him from getting needed medical treatment.

STATE'S RESPONSE TO APPELLANT'S POINT OF ERROR

The Court of Appeals did not err in holding that the evidence was sufficient to support the jury's finding that Appellant used or exhibited a deadly weapon when he was driving while intoxicated.

Appellant argues that the evidence was insufficient for finding that Appellant used or exhibited a deadly weapon while he was driving while intoxicated. (Appellant's Brief, pg. 6). Specifically, Appellant states that there was no evidence Appellant was operating his vehicle in a reckless or dangerous manner. (Appellant's Brief, pp. 6, 19-21). According to Appellant, the only evidence demonstrating dangerous or reckless operation was the occurrence of a collision and the consumption of alcohol by Appellant. (Appellant's Brief, pp. 6, 15-21). Appellant argues that this is not enough for a deadly weapon finding and this decision is in conflict with other decisions of this Court. (Appellant's Brief, pg. 6).

The State responds that Appellant used his vehicle in a manner capable of causing serious bodily injury or death. Specifically, Appellant operated his vehicle in a reckless and dangerous manner during the commission of the DWI offense both (1) before and at the time he hit Elbrich with his vehicle and (2) after hitting Elbrich with his vehicle. However, Appellant inappropriately attempts to limit the evidence

against him by limiting the relevant time period for determining whether the vehicle was used and exhibited as a deadly weapon to only the time period before and during the collision.

Standard of Review – Sufficiency of Evidence

The applicable standard of review is found in *Hernandez v. State*:

> In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). This standard gives full play to the responsibility of the trier of fact **to resolve conflicts in the testimony, to weigh the evidence**, and to draw reasonable inferences from basic facts to ultimate facts. *Id.*; *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), cert. denied, —— U.S. ——, 136 S.Ct. 198, 193 L.Ed.2d 127 (2015).
>
> **The trier of fact is the sole judge of the** weight and **credibility** of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). **Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder.** *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray*, 457 S.W.3d at 448. **We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution.** *Id.* at 448–49.
>
> The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Dobbs*, 434 S.W.3d at 170; *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014). Circumstantial evidence alone may be sufficient to support a conviction. *Hooper v.*

State, 214 S.W.3d 9, 13 (Tex.Crim.App.2007); *see Moore v. State*, 531 S.W.2d 140, 142 (Tex. Crim. App. 1976).

Hernandez v. State, 501 S.W.3d 264, 267 (Tex. App.—Fort Worth 2016, pet. ref'd) (emphasis added).

Applicable Law – Deadly Weapon

The Texas Penal Code defines "deadly weapon" as "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury. Tex. Penal Code § 1.07(a)(17)(B). Furthermore, specific intent to use a motor vehicle as a deadly weapon is not required. *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005). To sustain a deadly weapon finding there must be evidence that the defendant's use of his motor vehicle placed other people in actual, not just hypothetical danger of death or serious bodily injury. *Brister v. State*, 449 S.W.3d 490, 494 (Tex. Crim. App. 2014).

This Court has developed a two-prong test to support the finding of a motor vehicle as a deadly weapon. *Sierra v. State*, 280 S.W.3d 250, 255 (Tex. Crim. App. 2009). First, the reviewing court considers the manner in which the defendant used the motor vehicle during the commission of the felony. *Id.* Second, the reviewing court considers whether the motor vehicle was capable of causing death or serious bodily injury. *Id.* The manner in which defendant used the motor vehicle is analyzed by examining whether the defendant's driving was reckless or dangerous during the commission of the offense. *Id.* at 254.

Discussion

Sierra Prong 1: Appellant's Manner of Operating the Vehicle was Reckless and Dangerous

Here, the evidence demonstrates that Appellant's driving was both dangerous and reckless during the commission of the DWI offense. A person commits the crime of DWI if he or she "is intoxicated while operating a motor vehicle in a public place." Tex. Penal Code § 49.04(a). The elements of the offense of DWI are (1) the defendant, (2) operated, (3) a motor vehicle, (4) while intoxicated, and (5) on or about the date alleged in the State's charging instrument. *Reese v. State*, 273 S.W.3d 344, 346 (Tex. App.—Texarkana 2008, no pet.). For a felony DWI offense, the State must prove the additional element that the defendant has twice previously and sequentially been convicted of DWI. *Id.* at 347. Furthermore, unlike intoxication assault, which is a result-oriented offense, DWI is a conduct oriented offense. *Ex parte Benson*, 459 S.W.3d 67, 81 (Tex. Crim. App. 2015).

It is clear that Appellant not only consumed alcohol, but was intoxicated while driving his vehicle.[1] When Officer O'Rear first made contact with Appellant, she noted that Appellant had a strong odor of alcohol coming from his person. (2 RR 93). Appellant's speech was slurred, his eyes were bloodshot and glassy, and he was

[1] Appellant, in his brief, does not contest the sufficiency of the evidence for his DWI, 3rd or More conviction. However, the State addresses intoxication in relation to the deadly weapon finding made by the jury since Appellant infers in his brief that the evidence only demonstrates that Appellant consumed alcohol, not that he was intoxicated. (Appellant's Brief, pp. 5, 19-20).

swaying as he moved. (2 RR 95). Appellant first told O'Rear that he did not have anything to drink that night, but when O'Rear questioned that statement Appellant admitted to drinking two Four Loko beverages, equivalent to a 12-pack of regular beer. (2 RR 105-107). Appellant further refused to perform any standardized field sobriety tests and refused to submit to the taking of a blood specimen. (2 RR 109-111); *See Bartlett v. State*, 270 S.W.3d 147, 153 (Tex. Crim. App. 2008) (refusal to submit to standardized field sobriety tests or to submit to a blood-alcohol test is relevant evidence of intoxication). Officers O'Rear and Doran testified that based on their training and experience, they believed Appellant was intoxicated that night. (2 RR 57, 104-105).

The deadly weapon analysis applies to the time (1) before and during Appellant hitting Elbrich with his vehicle and (2) after hitting Elbrich with his vehicle. Officers Doran and O'Rear initially came into contact with Appellant when they were dispatched to 504 North Washington Street on a disturbance call; they were not dispatched to the scene of the collision. (2 RR 31-33; 2 RR 90). Appellant told both Officers Doran and O'Rear that he was driving north on the service road of Highway 6, just south of Tabor Road when he struck a pedestrian that had stepped out in front of his vehicle. (2 RR 41-42; 2 RR 96-97). The location the officers were dispatched to was located miles from the crash site. (2 RR 97). Appellant told the officers that after striking Elbrich with his vehicle, he did not call 911, but rather

loaded Elbrich into his vehicle and drove to 504 North Washington. (2 RR 42-43; 2 RR 97-98). Appellant was arrested for DWI at 504 North Washington. (2 RR 110). Because Appellant continued driving after striking Elbrich and he was charged with DWI, the analysis of whether Appellant operated his vehicle in a reckless or dangerous manner does not stop at the time of collision as Appellant suggests in his brief. (Appellant's Brief, pp. 18-21). Rather, the deadly weapon analysis applies to the time period both before and after the collision. *See Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003) (holding that because Appellant was charged with failure to stop and render aid, the relevant time period for determining whether the appellant used or exhibited his truck as a deadly weapon was after the victim was hit.).

Appellant used and exhibited his vehicle as a deadly weapon at the time of the collision by failing to control his vehicle and striking Elbrich. This Court held in *Moore v. State* that the appellant used his motor vehicle in a manner that was capable of causing death or serious bodily injury when he rear-ended another vehicle at a stoplight causing that vehicle to rear-end the vehicle in front of it. *Moore v. State*, 520 S.W.3d 906, 912-13 (Tex. Crim. App. 2017). In reaching this decision, the Court noted that "[w]hile we know nothing of the manner of Appellant's driving prior to his causing the accident, we can infer that he was going fast enough that the impact caused a chain reaction of collisions. . . ." *Id.* at 912. Furthermore, this Court also

noted that the appellant either failed to apply his breaks or applied them too late to avoid a collision. *Id.* at 912-13. There was no evidence of speeding or erratic driving before the appellant in *Moore* collided with the vehicle in front of him. *Id.* at 912. It also appears that no accident reconstruction was performed. *Id.* at 907-08.

Additionally, both the Third Court of Appeals and the Seventh Court of Appeals have held that an actual collision is evidence that the appellant operated his motor vehicle in a reckless and dangerous manner. *See Erikson v. State*, No. 03-13-00241-CR, 2014 WL 4179426, at *2 (Tex. App.—Austin Aug. 21, 2014, no pet.) (not designated for publication) (holding that the intoxicated appellant operated his vehicle in a reckless and dangerous manner when he took his eyes off the road to look at his cell phone and collided with another vehicle); *see also Pena v. State*, No. 07-15-00016-CR, 2015 WL 6444831, at *2-3 (Tex. App.—Amarillo Oct. 22, 2015, no pet.) (holding that the intoxicated appellant operated his motor vehicle in a reckless and dangerous manner when he failed to control his speed, rear-ended another vehicle, and also ran over a curb).

Similar to the facts in *Moore*, even though we do not know about Appellant's manner of driving before he hit Elbrich, we can infer that at the speed Appellant was traveling he was unable to control his vehicle and hit Elbrich with his vehicle "pretty hard" as noted by Officer Doran. (2 RR 39). Appellant testified he was traveling at thirty miles per an hour. (2 RR 174). However, Appellant hit Elbrich with his vehicle

so hard that the passenger side of the window was completely shattered and there was a large indentation in the windshield. (2 RR 38, 97). From the accident investigation performed by Officer Doran, it can also be inferred that as in *Moore* Appellant either applied his breaks too late in hitting Elbrich or never applied his breaks at all. Officer Doran performed an accident investigation when he arrived on scene at 504 North Washington. (2 RR 37). He noted the windshield of Appellant's vehicle was shattered, and there was a spider web of broken glass. (2 RR 38). There was blood in the spider webbing of the glass and dried blood on the hood of the vehicle. (2 RR 38). There was also a large indentation in the windshield, and the hood had minor damage. (2 RR 38). According to Doran, "[b]ased on the blood on the guy's face and the circular indentation in the glass, it looked to me like he got hit, thrown up over the hood, and his head hit the windshield." (2 RR 38). Appellant operated his vehicle in a reckless and dangerous manner by failing to control his vehicle and causing an actual collision hitting Elbrich. The Thirteenth Court of Appeals recognized Appellant's failure to control his vehicle noting that although they did not know the manner of Appellant's driving before hitting Elbrich with his vehicle "[Appellant] was unable to avoid striking Elbrich at a decent rate of speed, since Elbrich's head broke the windshield upon impact." *Couthren*, 2018 WL 2057244, at *5.

Appellant also used his vehicle as a deadly weapon after striking Elbrich with his vehicle by preventing Elbrich from getting needed medical attention. Appellant operated his vehicle in a dangerous and reckless manner by placing him in actual danger of death or serious bodily injury. In *Hill v. State*, this Court found that restraints including chains, belts, and locks were used as deadly weapons in the commission of an offense of injury to a child where the restraints were used in a manner so as to cause serious bodily injury by preventing a child from obtaining food. *Hill v. State*, 913 S.W.3d 581, 582-84 (Tex. Crim. App. 1996).

In the instant case, like the appellant in *Hill*, Appellant used his vehicle as a deadly weapon in the commission of the DWI. Appellant's vehicle, similar to the restraints in *Hill*, was used in a reckless and dangerous manner to prevent Elbrich from receiving needed medical attention. Appellant hit Elbrich with his vehicle and then loaded Elbrich into his vehicle and drove away. (2 RR 43, 97-98, 172). Elbrich was bloody and unconscious at the time. (2 RR 174). Elbrich testified that the last thing he remembered on that night was the Highway 6 overpass at Tabor Road. (2 RR 137, 139). Appellant admitted it took a lot of effort to load Elbrich into his vehicle. (2 RR 174). Appellant did not call paramedics to the scene of the accident even though he had a cell phone. (2 RR 172-173). Instead, Appellant drove the vehicle miles to 504 North Washington. (2 RR 97). As a result of the collision, Elbrich suffered injuries of six broken ribs, a broken leg, a possible concussion, and

a possible neck injury. (2 RR 140). O'Rear testified that Appellant continued to place Elbrich in danger of being hurt or dying by driving from the accident scene to 504 North Washington. (2 RR 115). Therefore, Appellant used his vehicle in as a deadly weapon by loading Elbrich in his vehicle and driving away. Appellant operated his vehicle in a reckless and dangerous manner by preventing Elbrich from getting needed medical attention and placing him in danger of serious bodily injury or death.

Appellant argues in his brief that no accident investigation was conducted stating "[h]ere no officer so much as went to the scene much less conducted any investigation concerning the cause of the collision." (Appellant's Brief, pg. 18). However, as discussed above an accident investigation was conducted at the scene where law enforcement was called. (2 RR 37-39, 51-52). While there was no detailed accident reconstruction at the location where Appellant hit Elbrich with his vehicle that was a result of Appellant's deliberate failure to call 911 when he hit Elbrich. Since Elbrich was unconscious after he was hit and did not remember being hit by Appellant's vehicle, the only individual who knew the location of the accident was Appellant. (2 RR 159, 138-139). However, not only did Appellant not call 911 after he hit Elbrich with his vehicle, he drove miles away from the scene of the accident to the location of his girlfriend. (2 RR 97, 172). Appellant drove to his girlfriend in an attempt to get her to admit fault to for the accident. (2 RR 76). Law enforcement only became aware of the accident when an individual at a business nearby called to

report a disturbance. (5 RR 21). Appellant's actions are the reason there was no detailed accident reconstruction.

Furthermore, Appellant claims that Elbrich stepped in front of his vehicle. (2 RR 158; Appellant's Brief, pg. 21). However, as mentioned above, Appellant did not call 911 after hitting Elbrich with his vehicle even though he had a cell phone on him. (2 RR 172). Instead, Appellant went to Rios and attempted to have Rios admit to hitting Elbrich. (2 RR 76). Specifically, Rios stated that Appellant "came up to me, grabbed me by the arm, and was telling me that he wanted me to go with him to the police station because he had ran over somebody and wanted me to say I was driving the vehicle." (2 RR 76). Additionally, Appellant originally told officers that he was driving north on Highway 6 when he hit Appellant. (2 RR 41, 171). Officer Doran testified that if Appellant was heading north on Highway 6 this was consistent with him heading towards his home. (2 RR 43, 47). At trial, Appellant changed his testimony and stated that he was driving south on Highway 6 when he hit Appellant with his vehicle. (2 RR 157, 171). Consequently, the jury was able to consider Appellant's inconsistent statements, judge his credibility, and determine that Appellant was not credible when he claimed that Elbrich stepped in front of his vehicle. *See Hernandez*, 501 S.W.3d at 267.

Overall, the evidence was sufficient to demonstrate that Appellant operated the vehicle in a manner that was capable of causing death or serious bodily injury.

The evidence shows that Appellant failed to control his vehicle and struck Elbrich. The evidence also demonstrates that after striking Elbrich, Appellant prevented an unconscious Elbrich from receiving needed medical treatment by restraining him in his vehicle.

Sierra Prong 2: Appellant's Vehicle was Capable of Causing Serious Bodily Injury or Death

The evidence also demonstrates that the second prong of the *Sierra* test was met, Appellant's vehicle was not only capable of causing serious bodily injury but actually caused serious bodily injury. As a result of being hit by Appellant's vehicle, Elbrich suffered six broken ribs, a broken leg, a possible concussion, and a possible neck injury. (2 RR 140). Elbrich was only able to return to work after two and half months due to the injuries he sustained. (2 RR 140). Overall, Appellant's vehicle was capable of causing death or serious bodily injury. *See Moore*, 520 S.W.3d at 913 (holding that although the victims only suffered minor injuries when the appellant rear-ended another vehicle causing that vehicle to rear-end another vehicle, appellant's vehicle was capable of causing death or serious bodily injury).

Overall, the evidence is sufficient to support the jury's deadly weapon finding.

PRAYER

Wherefore, premises considered, the State of Texas respectfully prays that Appellant's point of error be overruled, and that the conviction be in all things affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing State's Brief was emailed to Clint Sare, Attorney for Appellant, at cfs@sarelaw.com and the State Prosecuting Attorney, at information@spa.texas.gov on this the 9th day of November, 2018.

/s/ Rashmin J. Asher

Rashmin J. Asher
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

I do hereby certify that the foregoing document has a word count of 6785 based on the word count program in Word 2010.

/s/ Rashmin J. Asher